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Supreme Court, U.S.
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No. 221

In the Supreme Court of the United States

OCTOBER TERM, 1960

SUSIE BARNHILL, HOWARD G. PINDER, SR., HOWARD G. PINDER, JR. and FREDI CLARKE, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B 9, R. 81-84) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1960 (R. 85). The petition for a writ of certiorari was filed on July 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion in placing petitioners, who had pleaded guilty to evasion of federal gambling taxes, on probation on the condition that they not engage in further gambling activities.

STATUTE INVOLVED

The pertinent portion of the Federal Probation Act (18 U.S.C. 3651) provides as follows:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

STATEMENT

Petitioners were charged in the United States District Court for the Southern District of Florida with evasion of federal gambling taxes (R. 1-11). On December 15, 1959, they withdrew prior pleas of not guilty and entered pleas of guilty in open court, with counsel present. The court ascertained that the guilty pleas were intelligently and competently made (R. 29-48).

After the probation reports were filed with the court, the trial judge suspended the imposition of sentence and placed petitioners on probation on the condition, among others, that they leave the gambling field and not associate with people who are professional gamblers or are engaged in gambling or running lotteries. The court gave each petitioner the choice of a prison sentence or probation under these conditions. They accepted probation (R. 60-73).

On appeal, petitioners attacked, as an abuse of discretion, the condition forbidding gambling. The court of appeals dismissed the appeal, holding that the condi-

tion was a reasonable one and within the discretion of the trial court. (R. 82-84).

ARGUMENT

Petitioners contend that the condition prohibiting them from further gambling activities while on probation is impermissible because gambling is not a violation of federal law (albeit it concededly violates Florida law). The short answer is that the Federal Probation Act (*supra*) is "designed to provide a period of grace in order to aid the rehabilitation of a penitent offender" and that accomplishment of "the purpose of the statute [requires] an exceptional degree of flexibility in administration." *Burns v. United States*, 287 U. S. 216, 220-221. Certainly it does not exceed the limits to condition the grant of grace upon the defendant's undertaking to become a law-abiding citizen—that is, to comply with the law generally, whether it be federal law or state law. Indeed, persons placed on probation are commonly required to avoid habits and actions, *e.g.*, association with persons of ill repute, which are not unlawful at all.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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